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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 513.

STATE OF ALABAMA AND ALABAMA PUBLIC SERVICE COMMISSION, *Appellants*,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ATLANTIC COAST LINE RAILROAD COMPANY, ET AL., *Appellees*.

BRIEF FOR ALABAMA CARRIERS, APPELLEES.

STATEMENT OF CASE.

This is an appeal under the Act of October 22, 1913 (38 Stat. 219) from a final decree of the District Court for the Northern District of Alabama, Southern Division (Circuit Judge Bryan and District Judges Borah and Sibley), entered June 25, 1930, dismissing a bill brought by the State of Alabama and the Alabama Public Service Commission to enjoin and

set aside an order of the Interstate Commerce Commission, hereinafter called the Commission, establishing intrastate rates on fertilizer and fertilizer materials, in carloads, in Alabama (R. 232).

On a former appeal the Court affirmed the decree of the lower court (Circuit Judges Watkins and Foster and District Judge Grubb) denying an interlocutory injunction, upon the ground that no abuse of discretion had been shown. *Alabama v. United States*, 279 U. S. 229, 73 L. ed. 675. The Court held further:

> "The order of the Commission is within its general powers (Houston, E. & W. T. R. Co. v. United States, 234 U. S. 342, 354, 355, 358, 58 L. ed. 1341, 1349-1351, 34 Sup. Ct. Rep. 833; Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 585, et seq. 66 L. ed. 371, 382, 22 A. L. R. 1086, 42 Sup. Ct. Rep. 232), and was made after a full inquiry."
>
> *Alabama v. United States*, 279 U. S. 229, 230.

On final hearing before the three-judge court the case was reargued upon the original record. The court's opinion on final hearing is reported 42 Fed. (2) 469 (R. 223). Among other things the court below said:

> "The case has now been heard for final decree before three other judges, the original ones being all unable to act because of sickness or absence. The evidence is precisely the same as that dealt with on the preliminary hearing. We agree with each of the rulings made in the judgment refusing the preliminary injunction, which are, in general, to the effect that the plaintiffs had a full hearing before the Interstate Commerce Commission, that sufficient evidence supports the Com-

mission's findings, that the Alabama State rates, which were, in general, lower than those then prescribed for interstate commerce into and out of Alabama, would in future result in unjust discrimination against interstate commerce and in undue prejudice to persons and localities in interstate commerce, and that the state rates should, for remedy, be raised to conform; and that the establishment as a minimum for state rates of the interstate rates then in effect which permitted no differential for joint route hauls, was within the power of the Commission."

The order of the separately constituted three-judge court denying an interlocutory injunction appears at R. 230.

The Order Complained Of.

On July 30, 1924, a petition was filed with the Commission on behalf of all railroads operating in Alabama, wherein it was alleged that the Alabama Public Service Commission had required the railroads, by order, to establish and maintain rates on fertilizers and fertilizer materials within said state which were less than those permitted or required to be established by the Commission on interstate traffic, and that the maintenance of said intrastate rates would cause and result in undue and unreasonable preference and advantage to intrastate commerce and intrastate shippers and localities, and in undue and unreasonable prejudice of interstate commerce and interstate shippers and localities, and would unjustly and unreasonably discriminate against interstate commerce, in violation of Section 3 and subdivisions (3) and (4) of Section 13 of the Interstate Commerce Act. In this petition specific reference was made also

to the requirements of Section 15a of said Act (Section 422 of Transportation Act, 1920) and to the failure of the Alabama railroads, by reason of the said order of the Alabama Public Service Commission, to earn appropriate and necessary revenues upon the intrastate transportation of fertilizers and fertilizer materials within that state (R. 181).

On October 14, 1924, the Commission issued an order, Docket No. 16336, instituting an investigation with respect to the Alabama intrastate rates, which order was in part as follows:

> "It is ordered, (1) That an investigation be, and it is hereby, instituted to determine whether the rates on fertilizers and fertilizer materials required by the Alabama Public Service Commission to be maintained by said railroads, cause or will cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce; and as to what rates, if any, or what maximum or minimum, or maximum and minimum shall be prescribed to be charged by the petitioners, in order to remove such advantage, preference, prejudice or discrimination, if any, as may be found to exist;
>
> "(2) That all railroads subject to our jurisdiction operating within said state of Alabama be, and they are hereby, made respondents to this proceeding, and that a copy of this order be served upon each of said respondents, and that the state of Alabama be notified of this proceeding by sending copies of this order, and of said petition, by registered mail, addressed to the Governor of the State of Alabama, at Montgom-

ery, Ala., and to the Alabama Public Service Commission, at Montgomery, Ala." (R. 198.)

On October 7, 1924, the Commission, upon its own motion, ordered a general territorial investigation, Docket No. 16295, *Fertilizers and Fertilizer Materials Between Southern Points*, of the interstate rates on fertilizers and fertilizer materials throughout Southern territory as a whole (R. 200). The Alabama case, Docket No. 16336, together with two other proceedings, Docket Nos. 16335 and 16484, which had then been instituted and which brought in issue the intrastate rates on fertilizer and fertilizer materials in South Carolina and Georgia, respectively, were all consolidated with the general investigation, Docket No. 16295, and these cases were heard together and disposed of upon one record. After extensive hearings in which the Alabama Public Service Commission, as well as the commissions of various other Southern states, participated and introduced testimony, filed briefs, and appeared in oral argument, the Commission made the following finding, among others:

> "The maintenance of intrastate rates in Alabama on a lower basis than the corresponding rates herein found reasonable for the interstate transportation of fertilizers and fertilizer materials will for the future result in unjust discrimination against interstate commerce and in undue prejudice to persons and localities in interstate commerce" (R. 96).

No order, however, was then entered with respect to the Alabama intrastate rates, the Commission stating:

"It is believed that the respective State commissions will cooperate in authorizing such revisions as may be necessary to bring their rates into harmony with the interstate adjustment" (R. 97).

The authorities of the State of Alabama refused to permit the Alabama intrastate rates to be increased to the level found reasonable by the Interstate Commerce Commission, and the level to which that Commission found that said rates should be increased in order to remove the unjust discrimination against interstate commerce, and against persons and localities in interstate commerce, resulting from the rates prescribed and enforced in Alabama by the Alabama Public Service Commission. Thereafter, the Alabama carriers having filed a supplemental petition with the Interstate Commerce Commission, that Commission, on October 3, 1927, entered an order against certain carriers operating in Alabama, later amended to include all carriers operating in that state, which order provided, in part, as follows:

> "*It is ordered*, That the common carriers by steam railroad, parties to this proceeding (here follows list of carriers), according as they respectively participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before January 3, 1928, from practicing the undue prejudice, undue preference and advantages and unjust discrimination found in said report to exist in the relation of interstate and intrastate rates and charges for the transportation of fertilizers and fertilizer materials within the State of Alabama.
>
> "*It is further ordered*, That the said carriers, according as they respectively participate in the

transportation, be, and they are hereby, notified and required to establish, on or before January 3, 1928, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain rates and charges for the transportation of fertilizers and fertilizer materials in intrastate commerce within the State of Alabama which shall be not less, for corresponding distances, than the rates contemporaneously applied by said carriers, in accordance with our order of July 19, 1926, and as subsequently amended, to the transportation by said carriers of fertilizers and fertilizer materials between points in the State of Alabama and points in other states of the United States" (R. 23).

It is this order of October 3, 1927, as amended, which the appellants seek to enjoin. This order is grounded upon the conclusion and finding by the Commission, as above quoted, that the maintenance for the future of the lower intrastate rates in Alabama will cause both (1) undue discrimination against interstate commerce as such; and (2) undue prejudice to persons and localities in interstate commerce.

BRIEF OF THE LAW.

The order is within the general powers of the Commission.

Alabama v. United States, 297 U. S. 229, 73 L. ed. 675.

The general powers of the Commission include the powers conferred by Sections 13 (4) and 15a of the Interstate Commerce Act, as amended by Transportation Act, 1920, and there is a "dovetail relation" between these two provisions of the statute.

Railroad Commission v. Chicago, B. & Q. R. Co. (*Wisconsin Case*), 257 U. S. 563, 66 L. ed. 371;
Dayton-Goose Creek R. Co. v. U. S., 263 U. S. 456, 68 L. ed. 388;
New England Divisions Case (*Akron, C. & Y. R. Co. v. U. S.*), 261 U. S. 184;
Florida v. U. S., 75 L. ed. —, U. S. Adv. Ops. p. 212.

"In construing the statute this court has held that the general provision of section 13 (4) prohibiting 'unjust discrimination against interstate commerce' and authorizing the Commission to establish intrastate rates to prevent such discrimination, is to be read in connection with Section 15a, both of which were added by Transportation Act (February 28), 1920 (Sections 416, 422, 41 Stat. at L. 484, 488, chap. 91, U. S. C. title 49, Sections 13, 15a). There is what this court has called a 'dovetail relation' between the two provisions. The authority granted by Section 13 (4) is thus to be considered in the light of the affirmative duty of the Commission to fix rates and to take other important steps to main-

tain an adequate national railway system."
Florida v. U. S., supra, p. 218.

In the exercise of the powers thus conferred, the Commission is fully authorized to establish a statewide level of intrastate rates when such action is necessary in order to accomplish the purposes of the statute.

> "In the exercise of this power, the Congress has given to the Commission authority not only to remove an undue prejudice as between persons or localities, but to establish a statewide level of intrastate rates when this is found to be necessary to accomplish the purpose of the statute."
> *Florida v. U. S.*, p. 218.

In the *Florida Case* the Court has further pointed out that undue discrimination against interstate commerce, as the expression appears in Section 13, is unlike undue discrimination against persons or localities in relation to interstate commerce, being grounded upon different considerations. The Court said (p. 220):

> "In dealing with unjust discrimination as between persons and localities in relation to interstate commerce, the question is one of the *relation of rates to each other*. In considering the authority of the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carrier's revenue, the question is that of the *relation of rates to income*." (Italics ours)

And when the Commission, in the exercise of the special powers conferred by Sections 13 and 15a of

the Act, as amended by Transportation Act, 1920, enters what had theretofore been the exclusive domain of state regulation, and establishes a statewide level of intrastate rates for the removal of undue discrimination against interstate commerce from the standpoint of carrier income, there must be appropriate and adequate findings by the Commission of the underlying grounds justifying the exercise of the power. As the Court said:

> "The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear."

and further:

> "If the action of the Commission is not simply for the removal of undue prejudice against interstate commerce as between persons or localities, and the Commission undertakes to prescribe a statewide level of intrastate rates in order to avoid an undue burden, from a revenue standpoint, upon the interstate carrier, there should be appropriate findings upon evidence to support an order directed to that end."
>
> *Florida v. U. S.*, *supra*, p. 219.

With respect to discrimination between particular persons or localities, it has been held in a long line of cases that the existence of such discrimination is a question of fact as to which the Commission's findings, if supported by evidence, are conclusive and will not be reviewed by the courts.

United States v. Louisville & N. R. Co., 235 U. S. 314, 59 L. ed. 245;
Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S. 452, 54 L. ed. 280;
Interstate Commerce Commission v. Delaware, L. & W. R. Co., 220 U. S. 335;
Virginian Ry. Co. v. United States, 272 U. S. 658;
Western Paper Makers Chemical Co. v. United States, 271 U. S. 268;
Seaboard Air Line Ry. Co. v. United States, 254 U. S. 57.

And that this rule applies alike to discrimination between interstate shippers or localities, and to discrimination between interstate shippers or localities, on the one hand, and intrastate shippers or localities, on the other, is well recognized.

Minnesota Rate Cases (*Simpson v. Shepherd*), 230 U. S. 352, 57 L. ed. 1511;
Houston E. & W. T. R. Co. v. United States, (*Shreveport Case*), 234 U. S. 342, 58 L. ed. 1341.

A statewide order may accordingly be based also upon such findings by the Commission of discrimination between persons or localities, but it must appear in that case that the discrimination found by the Commission, upon the evidence before it, is co-extensive with the "sweep of the order" (*Wisconsin Case, supra*, 66 L. ed. at p. 380). If the order is statewide in its scope, the discrimination also must be statewide.

ARGUMENT.

The Court having held on former appeal that the order of the Commission "was made after a full inquiry" (*Alabama v. U. S., supra*), it is believed unnecessary to discuss further the point, included in the Assignment of Errors (R. 237), that appellants were not accorded a full hearing by the Commission.

With respect to the point further relied upon, that there is an insufficiency of evidence and findings by the Commission, we contend that appellants take too narrow a view of the proceedings before the Commission and its report, as instanced by such statements, on brief, as that "the Commission found certain facts in that part of its opinion set aside for a discussion of the Alabama intrastate rates. To this finding counsel are limited in their search for material to support the broad orders of the Commission" (Appellants' brief, p. 28). Since the Alabama case, No. 16336, was consolidated with the General Investigation, No. 16295, which the Commission ordered on its own motion, it is essential to a clear understanding of what transpired to consider the entire record in this General Investigation and the report of the Commission as a whole. It will then appear that throughout the hearings before the Commission, and throughout the Commission's report, the Alabama situation, including the so-called "Alabama scale" of rates on fertilizer and fertilizer materials as applied intrastate within that state, was specifically and particularly dealt with by the Commission.

1

THE ORDER, AS GROUNDED UPON UNDUE DISCRIMINATION AGAINST INTERSTATE COMMERCE AS SUCH, IS SUPPORTED BY APPROPRIATE AND ADEQUATE FINDINGS BY THE COMMISSION, ALL OF WHICH ARE AMPLY SUSTAINED BY THE EVIDENCE.

An issue having been here raised concerning the adequacy of the Commission's findings and its statement thereof in the report which accompanied its order, we will first review the proceedings before the Commission together with its report, quoting freely, for purposes of convenient reference, the language of the report verbatim.*

Scope and Twofold Purposes of Commission's Investigation.

The report of the Commission in the general investigation, and the cases consolidated therewith for hearing and disposition, is entitled "*Fertilizers and Fertilizer Materials Between Southern Points*", reported in 113 I. C. C. at page 389.** (R. 32.)

On March 9, 1925, a notice was issued by the Commission outlining in detail the purposes of the general investigation, Docket No. 16295 and consolidated cases, and indicating certain subjects which it

*Where quotations are italicized herein the italics have been supplied, unless otherwise indicated.

**Two supplemental reports were issued which are reported in 123 I. C. C. at page 193, and 129 I. C. C. page 215. (R. 125, 135.) These supplemental reports dealt with measure of relief to be accorded various short or weak lines in the Southeast, and with petitions for relief from the long-and-short-haul provision of Section 4 of the Interstate Commerce Act.

was thought should be developed at the hearings. In that notice, served on all parties of record, it was said:

> "The purpose of the proceeding is to determine upon a basis of rates for interstate application throughout the territory involved which will be reasonable for the transportation of this particular traffic, will be free from undue prejudice and preference, and will conform to the fourth section of the act. With the proceeding there have been consolidated for hearing investigations under section 13 of the act instituted upon petition of the carriers and involving alleged undue preference of intrastate traffic in Alabama, South Carolina, and Georgia, and alleged undue prejudice to interstate traffic. *While other intrastate rates have not been brought in issue, the desirability of fixing interstate rates which can fairly and appropriately be used as a basis for achieving harmony between the interstate and intrastate rates will be kept constantly in mind. With this in view, testimony relating to intrastate adjustments will be freely admitted.*" (R. 207, 208.)

Then follows the statement that, as an initial step in the investigation, the respondent carriers would be expected to present at the first hearing the basis of rates which they believed should be established, together with evidence supporting that basis. A list of some of the more important subjects which the Commission thought should be developed through the evidence is set forth in this notice (R. 208). This list contains, among other things, the following:

> "At what points are the principal fertilizer mills located?

"Is fertilizer used generally throughout the territory, or is its use confined to particular sections?

"What is the volume of the intrastate traffic as compared with the interstate traffic and what are the relative levels of the present interstate and intrastate rates?

"Should fertilizer be accorded rates below what would otherwise be normal because of its value to the agricultural industry in increasing production, and its consequent value to the carriers because of the resultant increase in tonnage through its use?

"In addition to general evidence with respect to the nature, volume and distribution of movement, an actual traffic test will be desirable covering a period when the traffic under consideration is moving freely" (R. 209, 210).

In the order of October 7, 1924, inaugurating the general investigation, it was recited:

(a) That in many instances interstate rates on fertilizers and fertilizer materials between points in Southern Classification territory differ materially for substantially similar hauls, and that many of said rates are higher for the shorter distances than for the longer distances over the same line or route; and

(b) That from numerous formal and informal complaints to the Commission it appeared that said interstate rates on fertilizers and fertilizer materials were, in general, unsatisfactory to the manufacturers and shippers, and that a general revision thereof had been proposed by the carriers, and that petitions had

been filed by carriers operating in the states of South Carolina and Alabama (and later in Georgia), alleging that the rates on this traffic in effect within those states caused undue and unreasonable advantage, preference, and prejudice as between persons and localities in interstate commerce, on the one hand, and intrastate commerce, on the other, and an undue burden upon and unjust discrimination against interstate commerce (R. 200).

Thereupon said investigation was by the Commission instituted on its own motion—

> "Into and concerning said interstate rates on fertilizer, fertilizing compounds, and fertilizer materials, and the charges resulting therefor, applicable between points in the territory described (being Southern Classification territory), with a view to determining whether said rates and charges are unreasonable or are unduly prejudicial to or unduly preferential of particular localities or persons, and to making such order or orders as may be proper in the premises" (R. 200).

In the separate order in Docket 16336, which concerned rates on fertilizer and fertilizer materials within the state of Alabama, it was recited:

(a) That a petition had been filed on behalf of *all the steam railroads* operating in the state of Alabama, averring that the Alabama Public Service Commission by the order therein designated (dated May 26, 1924), had required the railroads in Alabama to establish intrastate rates on this traffic which were less than those permitted or required to be estab-

lished by the Interstate Commerce Commission for interstate traffic;

(b) That said railroads, petitioners, alleged that the observance by the railroads operating in Alabama of the order of the Alabama Commission would cause and result in undue and unreasonable preference and advantage to intrastate commerce, to the undue and unreasonable prejudice and disadvantage of interstate commerce, and would result in unjust and unreasonable discrimination against interstate commerce; and

(c) That by said petition there had been brought into issue rates imposed by the authority of the State of Alabama.

At the opening of the first hearing in these consolidated proceedings at Atlanta, Georgia, on April 20, 1925, Commissioner Eastman, presiding, made the following statement:

"This is Docket No. 16295, an investigation on the Commission's own motion of interstate rates on fertilizer, fertilizing compounds and fertilizer materials between points in Southern Classification territory, including rates between points in that territory on the one hand, and the north bank of the Ohio River and Helena, Ark., and points in Virginia on the other. There have likewise been consolidated for hearing at this investigation, Docket No. 16335, rates on fertilizers and fertilizer materials within the state of South Carolina; Docket No. 16336, rates on fertilizers and fertilizer materials within the state of Alabama; and Docket No. 16484, rates on fertilizers and fertilizer materials within the state of Geor-

gia; these three dockets being investigations under Section 13 of the Interstate Commerce Act instituted upon petition of the carriers, and involving alleged undue preference on intrastate traffic and alleged undue prejudice to interstate traffic in the three named states. Various notices have been sent to all interested parties in regard to this investigation, indicating some of the points which the Commission felt ought to be developed in connection with this investigation. I think it unnecessary to burden the record by repeating the substance of those notices at this time" (R. 251).

During the progress of the same hearing, Commissioner Eastman reiterated the purpose of the proceeding, as it concerned intrastate rates, and made it plain that the Commission was endeavoring to prescribe a level of interstate rates and to fix a scale to cover those rates which could fairly and appropriately be used for both intrastate and interstate rates throughout Southern territory (R. 415).

In the Commission's report in Docket 16295 and consolidated cases, 113 I. C. C. 389, it was pointed out in the opening sentence that—(R. 35):

"Dissatisfaction on the part of shippers and users as well as of carriers with the rates on commercial fertilizer and fertilizer materials in Southern territory has for some time been increasingly evident.

"Our decisions upon such formal complaints as have been brought have served only to mitigate the discontent in the particular sections affected.

"Interstate rates vary greatly for substantially similar hauls; many indefensible fourth-section departures exist; and the intrastate rates which have been enforced by some of the States

are attacked by the carriers as unreasonably low, and it is alleged that they adversely affect manufacturers and dealers shipping into those States over interstate routes. During 1924 three petitions were filed with us by carriers seeking relief under section 13 of the interstate commerce act from the intrastate rates, respectively, in South Carolina, Alabama, and Georgia."

The Commission then said that three times the rates on fertilizer from Norfolk to points in North Carolina had been under investigation by it in what had come to be known as the *Royster cases;* that the rates there finally prescribed were deemed unsatisfactory by the North Carolina Corporation Commission; and that the foregoing conditions and variations in the rate levels, both interstate and intrastate, obtaining throughout southern territory, led the Commission on October 7, 1924, to institute this general investigation on its own motion (R. 36). The purpose of this proceeding was then briefly summarized in the report (113 I. C. C. at page 392) as follows (R. 36):

"The purpose of this proceeding, therefore, is to determine upon a basis of interstate rates for the movement of fertilizer and fertilizer materials throughout southern territory which will be reasonable and free from undue prejudice and preference, and which will conform, as nearly as may be, to the provisions of the fourth section. With the proceeding have been consolidated for hearing and disposition the three section 13 cases already referred to. While other intrastate rates have not been brought in issue, the desirability of fixing interstate rates which can appropriately and fairly be used as a basis for

uniformity in both classes of rates has been rec
ognized from the outset."

Referring to the so-called Hoch-Smith Resolutio
of Congress, it was added:

"At the initial hearing the parties were ad
vised that the principles of the so-called Hoch
Smith Resolution are now a part of the law, an
that conclusions would be reached with thos
principles in mind" (R. 36).

The Commission thereafter reviews at length i
its report the probable effect, upon the aggregat
revenues of the Southern carriers, of such uniform
rates as might be adopted for general applicatio
throughout the territory (R. 67). And in announcin
the scale of rates which it had decided to adopt, th
Commission said (R. 78):

"Upon the record before us no other metho
of determining just and reasonable rates is pos
sible than the exercise of our best judgment i
the light of all the evidence submitted. Afte
careful consideration of this evidence, which w
have summarized above, *and having in mind th
principles which we believe should be applied i
distributing the burden of rail transportatio
and which are also set forth above,* we hav
reached the conclusion that a scale somewha
different from that recommended by the exam
iner, *but producing much the same aggregat
revenue,* should be adopted."

We have, therefore, a general proceeding of inves
tigation—with which the Alabama case was consol
idated—which was instituted by the Commission o

its own motion; was purposely made territorial in its scope; and the underlying objects of which were twofold, namely:

(a) To determine the rate level throughout Southern territory which should uniformly govern interstate rates, and likewise serve as a standard or measure for bringing intrastate rates into harmony therewith, to the end that existing discriminations against shippers and localities would be removed; and

(b) To assign to fertilizer and fertilizer materials an appropriate position in the general scheme of rates throughout Southern territory as a whole, having in mind the preservation to the southern carriers of the necessary revenues in the aggregate on this important item of their total tonnage.

The authorities of the State of Alabama did not—and do not here—question the power of the Commission to institute an investigation of this sort. They did not question the fact that in so doing the Commission proceeded within the scope of its lawful powers and duties as imposed by the controlling provisions of the applicable statutes. Neither did the Alabama authorities question the fact that a general investigation of this character, which was in terms made territorial in its scope and included Southern territory as a whole, represents the most practicable method of procedure whereby the Commission could accomplish the announced purposes thereof. On the contrary, upon invitation extended by the Commis-

sion, acting in a spirit of cooperation,* the state commissions of various states, including the Alabama Public Service Commission, participated actively throughout the proceeding. The Commission states in its report:

> "The state commissions of Alabama, Georgia, Florida, Mississippi, Kentucky, and North Caroline were represented at the hearings, and they took an active and helpful part in developing the record" (R. 37).

There can be no room, therefore, for the contention here that the order with respect to the Alabama rates must be segregated from the general investigation and considered apart from, and independently of, the purposes and scope of that investigation as a whole. Neither can it appropriately be urged, as appellants have sought to do, that the Commission did not proceed under the related provisions of both Sections 13 and 15a of the Act, as well as under Section 3 and the Hoch-Smith Resolution. On the contrary, the underlying and announced purpose of the entire investigation was to enable the Commission to discharge the affirmative duties

*Section 13 of the Interstate Commerce Act provides, in part, as follows:

"The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act."

resting upon it, as imposed by all of the foregoing statutory provisions, by determining a level of rates on fertilizer and fertilizer materials which would alike be reasonable and non-discriminatory for uniform application throughout the South, and which would in addition yield on this traffic, in its relation to other commodities and classes of traffic, its appropriate contribution to the aggregate revenues of the southern carriers as a whole, necessary for the proper maintenance of the transportation system.

PRINCIPLE OF UNIFORMITY NOT QUESTIONED.
ISSUES CONCERNED ONLY THE PROPER LEVEL OF UNIFORM BASIS.

Having in mind the announced purposes of the general investigation, as above described, the carriers proposed and advocated, for general and uniform application throughout Southern territory, a "mileage scale" of rates, *i. e.*, rates graded upon a distance basis, commonly known as "the Royster scale." This scale had previously been fixed by the Commission in *Royster Guano Co. v. A. C. L. RR. Co.*, 50 I. C. C. 34, and had been adopted throughout a considerable portion of Southern territory. On the other hand, the shippers, together with various state commissions, including the Alabama Public Service Commission, proposed and advocated for such general application a very much lower mileage scale. This scale, commonly referred to as "the Alabama scale," was the same scale that had been prescribed theretofore by the Alabama Commission for intrastate application in that state. *In other words, it is the same scale of intrastate rates in Alabama to which the order complained of in this case relates in terms.*

Throughout the entire proceedings before the Commission there was no intimation or suggestion on the part of any shippers, or on the part of the Alabama Commission itself, that any issue was presented except upon the question as to what would be the reasonable and proper level of such mileage rates as might be adopted for uniform application throughout the territory covered by the investigation.

Upon this subject the Commission found and stated in its report (R. 52):

> "The shippers' case was presented largely by representatives of manufacturing organizations, members of the National Fertilizer Association. The Alabama Public Service Commission also took an active and important part in support of the rates proposed. Testimony was offered on behalf of the Kentucky Railroad Commission, a statement was made by one of the North Carolina commissioners, and helpful cross-examination was conducted by representatives of the Florida, Georgia, and Mississippi commissions. *The shippers are at one with the carriers in urging uniformity in the rates; the predominant issue is with respect to their level.*"

The Commission further stated (R. 76):

> "Carriers and shippers agree, with a single exception that a uniform level of fertilizer rates is desirable throughout all of southern territory. The single exception is the Florida East Coast, which desires a somewhat higher level to and from points in the Florida peninsula. *Considering all the circumstances surrounding this particular form of traffic and the general agreement upon this point, resulting in a paucity of evidence to the contrary, we think that the record supports one uniform level.*"

The representative of the Alabama Public Service Commission, testifying on its behalf, prefaced his testimony with the following statement:

> "There is included in this investigation a thirteenth section complaint against the revised Alabama intrastate rates on fertilizer, and my testimony will be submitted for the dual purpose of sustaining the Alabama rates in the thirteenth section case, and establishing their reasonableness for general application on interstate traffic throughout the southeastern territory" (R. 809).

This witness, in other words, did not question the theory of uniformity. On the contrary he urged, as a basis for bringing about such uniformity between the interstate rates and the intrastate rates in Alabama, the adoption of the "Alabama scale" instead of the much higher scale which the carriers had proposed.

The traffic manager of the Virginia-Carolina Chemical Corporation, who appeared on behalf of this company and the National Fertilizer Association, and who likewise advocated the adoption of the shippers' proposed scale (the Alabama scale), said (R. 704):

> "We are proposing the same rates intrastate as interstate. I don't see how we can except any state from that to be consistent. I think rates should be the same in all states, especially if the interstate rate is the same. We are not suggesting that there should be any different level of rates in different parts of Southern territory."

Commissioner Maxwell, a member of the North Carolina Corporation Commission, stated in part (R. 604):

"It is our opinion that a lower level than the Royster Scale should be adopted for general application throughout the Southeast, and it is the purpose of the North Carolina Corporation Commission to revise the schedule of rates on fertilizer between points in North Carolina before the season for another general movement of fertilizer *and as soon as this may be done without creating discrimination against interstate shippers.*"

A representative of the President of the National Fertilizer Association, testified:

"Q. May it fairly be said, Mr. Strobhar, so far as you know, it is the point of view of the executive committee of the Association that it is quite important, as soon as possible, to substitute a uniform mileage basis on fertilizer for the present, more or less jumbled hodge-podge of rates that exist?

"A. They are important, very important" (R. 353).

The witness for the Southern States Phosphate & Fertilizer Company said:

"I am here representing the Southern States Phosphate & Fertilizer Company at Augusta, and their head office in Savannah, and we are here to ask removal of the discrimination against us in favor of shippers at Charleston and Columbia, South Carolina."

"* * * Under the Constitution of the United States and under the Interstate Commerce Law, this company is entitled to have the above mentioned discrimination against it removed.

"The whole trend of Federal legislation and judicial construction has been in the direction of

preventing discrimination by one State against another in general commerce" (R. 605, 607).

Throughout the entire record in the consolidated proceedings, and throughout the entire report of the Commission, there will be found no intimation or suggestion on the part of the shippers, or on the part of the Alabama Public Service Commission, to the effect that such mileage rates as might be adopted should not be applied uniformly, both intrastate and interstate, including the State of Alabama as well as other portions of Southern territory.

LEVEL OF INTERSTATE RATES DETERMINED ONLY UPON ASSUMPTION THEY WOULD APPLY UNIFORMLY.

It has been pointed out that the very purpose of the Commission in instituting and conducting the general investigation was to fix the rate level throughout Southern territory which should govern interstate rates and likewise serve as a standard and measure for bringing the intrastate rates into harmony therewith, to the end (1) that both the interstate and the intrastate traffic in fertilizers and fertilizer materials should alike contribute their reasonable and proper proportions of the general revenues of the Southern carriers, and (2) that existing discriminations against persons and localities should be removed. The Commission's report shows conclusively *that the level of the scale which the Commission adopted was determined only upon the assumption, and with the understanding and positive expectation, that the intrastate rates and the interstate rates should be harmonized and made uniform by the use of the standard represented by this uniform mileage scale.*

The investigation was comprehensive in its scope. It covered the entire field. It appears from the report that the Commission had before it not only the interstate rates throughout the South, but also the intrastate rates in the several southern states, including Alabama, and the tonnage handled thereunder and the revenue derived therefrom. There were before the Commission the state scales and the levels of intrastate rates in Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Tennessee and Kentucky. A table inserted in the report (R. 42) displays representative scales of rates for intrastate application in each southern state, compared with the carriers' proposed scale submitted in the general investigation.

Tonnage and Revenue Findings.

The Commission emphasizes in its report the importance of fertilizer in southern territory. Upon this subject it found as follows (R. 37):

> "Of the various sections of the country, southern territory is by far the largest user of fertilizer. Out of a total consumption in the United States of 6,647,308 tons in 1923 it used 4,220,807 tons. Of the Southern States, North Carolina, South Carolina, and Georgia led in the amount consumed, their total for that year being 2,436,375 tons. In 1924 the total production was 7,272,000 tons, of which southern territory used 4,680,000 tons, a little less than half of which was used on cotton alone."

A table in the report (R. 37) sets forth the average consumption of fertilizer per acre in 1922, separately

for each state in the South. It shows 103 pounds per acre for Alabama; 136 pounds for Georgia; Virginia 210 pounds; South Carolina 231 pounds, etc. Commenting upon this table, the Commission adds (R. 38):

> "The above figures do not represent the actual application per acre, for not all cultivated lands are fertilized. For example, in Alabama the average amount used per acre on fertilized crops was about 230 pounds."

Referring to testimony of the agricultural statistician of the Alabama extension service, the Commission said:

> "It is his belief that around 4,000,000 tons of fertilizer could be profitably used in Alabama alone, provided it could be bought at a reasonable price, *instead of the 580,000 tons used in 1925*" (R. 58).

Concerning the usual length of the hauls of fertilizer and fertilizer materials, it was said (R. 66):

> "It is shown that of the total tonnage of fertilizer and materials, amounting to 3,189,819 tons, *70 per cent moved for distances of 150 miles and less.* Of the single-line traffic, one-half moved for distances of 85 miles and less, and one-half of the joint-line traffic moved less than 140 miles. These figures bear out testimony of record. * * * For example, it was shown that from 13 plants located at 10 points in Alabama *the average outbound haul was 51 miles*, while materials moved inbound to the same plants an average distance of 355 miles. The inbound hauls, of course, vary considerably, depending on the location of the

plant with respect to the principal source of its raw materials."

The Commission likewise emphasizes the very great importance to the southern carriers of their tonnage and revenues on fertilizers and fertilizer materials. It said (R. 38):

"Fertilizer tonnage is also of relatively greater importance to the southern carriers than to the lines in other sections. In 1923 such tonnage of the southern roads *represented 1.46 per cent of their total freight tonnage*, as compared with 0.35 per cent in the eastern district and 0.18 per cent in the western district. The Atlantic Coast Line leads the southern carriers in the total of fertilizer handled, with the Southern second and the Seaboard Air Line third. In the ratio of fertilizer to total freight, the Central of Georgia ranks first, its fertilizer tonnage being 6.61 per cent of the total, with the Atlantic Coast Line second and the Norfolk Southern third. These tonnage figures do not include such materials as potash, acid phosphate, and nitrate of soda, which, for purposes of our statistical returns, are included in commodity Group 66 chemicals and explosives. If these were included, the fertilizer tonnage figures would be appreciably increased. *The total revenue of Class I roads in the southern district for 1923 from such tonnage was $10,807,000, or 1.3 per cent of the total revenue from all freight handled.* In the eastern district the revenue from fertilizer tonnage was but 0.3 per cent of the total. The revenue of the Atlantic Coast Line from this source was 4.7 per cent of its total freight revenue in 1924, and that of the Southern for the first seven months of 1924 was 3.63 per cent of this total for the same period."

Based upon a "traffic test," or rerating of the fertilizer tonnage, which the carriers made at the request of the Commission—and which included and embraced both the intrastate traffic and the interstate traffic throughout the South—the Commission found (R. 66):

> "The test showed that 2,154,422 tons, or 67 per cent of the total, moved single line, *and 2,189,254 tons, or about 69 per cent, moved intrastate.*"

It was further shown in the report that:

> "Of the total revenue of $7,947,908, *almost 60 per cent, or $4,753,932, accrued on intrastate traffic*" (R. 66).

The Commission contrasts in its report the probable effect upon the carriers' revenues, as determined by this traffic test, of the adoption of the carriers' proposed scale (the Royster scale), on the one hand, or the shippers' proposed scale (the Alabama scale), on the other. Concerning the first-named scale, the Commission stated (R. 67):

> "The test shows that for the period covered the Royster scale would result in an increase in revenue, exclusive of Florida, of $834,285, which on a yearly basis would amount to about $1,668,000. As applied to interstate traffic alone, the Royster scale would result in additional revenue of about $420,000 for the year, or approximately 25 per cent of the estimated total."

As to the revenue effect if the shippers' proposed scale should be adopted, it was said:

> "The carriers estimate roughly that the shippers' scale would result in a reduction in their revenues of not less than $636,146, *or $1,272,000 on an annual basis*" (R. 67).

And that the above estimate is approximately correct is admitted by the Alabama Public Service Commission in its petition for rehearing before the Commission, dated October 30, 1926, which was by stipulation made a part of the printed record on this appeal (R. 245).

It thus clearly appears that the question of undue discrimination against interstate commerce, from the standpoint of the territorial revenues of the Southern carriers, was accorded a predominant position throughout the proceedings before the Commission. It can hardly be contended otherwise when it is seen that for this very purpose, and in order to determine the revenue effect of the scales of rates which were advocated by the respective parties, the Commission had the carriers rerate all of the fertilizer tonnage throughout the South, both state and interstate, for a representative two months' period. And based upon this "traffic test" it estimated that about 70 per cent of this entire traffic in the South is intrastate; and further, that about 60 per cent of the entire annual revenue of the Southern carriers on this traffic is derived from the intrastate movements. It found that the fertilizer tonnage in 1923 represented 1.46 per cent of the total freight tonnage of the Southern carriers; that the revenue thereon of the Class I roads was $10,307,000, or 1.3 per cent of the total freight revenues of these carriers. It determined the level

of a scale which in its judgment would preserve as nearly as possible the aggregate revenues of the carriers on this fertilizer tonnage provided it should be applied uniformly, on both intrastate and interstate traffic alike; and it ordered and prescribed this scale for uniform interstate application in the full expectation that the same scale would likewise be adopted in the several states, including the State of Alabama. It was estimated—and this estimate is admitted by the Alabama Commission to be approximately correct—that the adoption for this purpose of the Alabama basis of rates, on the other hand, would have meant instead an annual revenue loss to the Southern carriers of *about $1,272,000* out of their previous revenues on this traffic of $7,947,908.

It will not do, therefore, for appellants to urge that the Court should now cast out of view and ignore the nature and purposes of the general investigation which the Commission instituted and conducted, and with which the Alabama case was consolidated, and limit the consideration of the Commission's findings, including all of the above findings under Section 13 in its close relationship with Section 15a, as though the particular issues in the Alabama case were being investigated independently of the territorial situation as a whole. Neither can Section 15a of the Act be read out of the case, as appellants would have it, upon the theory that this section was not named in pleadings before the Commission. As a matter of fact, this section was pleaded and relied upon in the carriers' petition to the Commission for investigation of the Alabama rates. But it was not necessary that it should be pleaded in order that the Commission might consider it. The scope of the issues was gov-

erned by the Commission's order of investigation. And in such investigation, instituted by the Commission on its own motion, the Commission was both empowered and indeed obligated to give effect to all applicable provisions of the governing statutes, including both Section 15a and Section 13, between which the Court has said that there is a "dovetail" relationship.

Nor is there room for the contention, likewise advanced by the appellants, that reliance upon Section 15a must depend upon the question whether the southern carriers, at the time of the hearings, were or were not earning as a group the prescribed rate of return contemplated under that section. It is well recognized that the amount of the aggregate earnings of carriers on all traffic affords no criterion of what are reasonable and proper earnings on individual commodities or classes of traffic, which latter may be either too high or too low in relation to the general scheme. And by the Hoch-Smith Resolution—which the Court has declared to represent largely a reaffirmation of existing law (*Ann Arbor R. Co. v. U. S.*, 74 L. ed. 1098)—the Commission is particularly enjoined and directed to make a "redistribution" of rates as between the various commodities and classes of traffic, having in mind always the maintenance of an adequate transportation system.

In the *Dayton-Goose Creek Co. case*, the Court said:

> "Reliance is also had on decisions of this court in cases where the question was of the reasonableness of state rates, and it was held that evidence to show that the revenue of the carrier from both state and interstate commerce gave a fair profit was not relevant. The state cannot justify un-

reasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, and, on the other hand, the carrier cannot justify unreasonably high rates on domestic business on the ground that only in that way is it able to meet losses on its interstate business. Minnesota Rate Cases (Simpson v. Shepard), 230 U. S. 352, 436, 57 L. ed. 1511, 1556, 48 L. R. A. (N. S.), 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Smyth v. Ames, 169 U. S. 466, 541, 42 L. ed. 819, 847, 18 Sup. Ct. Rep. 418."

Dayton-Goose Creek R. Co. v. U. S., 263 U. S. 456, 68 L. ed. 388, 400.

LOW LEVEL OF ALABAMA INTRASTATE RATES.

Under the captions "The Carriers' Proposal" (R. 39) and "The Shippers' Proposal" (R. 53), the report exhaustively reviews the relative merits of the alternative scales which had been advocated by the respective parties "in order to remove the many inconsistencies in the fertilizer rate structure" (R. 39). Among other things, these scales are compared with numerous other scales of rates on fertilizer, both state and interstate, as then applicable in the South as well as other parts of the country, and are compared also with rates and revenues on other commodities. A table (Appendix C to the report) displays in its entirety the Alabama scale, proposed by the shippers, compared with the carriers' proposed scale and the so-called Memphis-Southwestern scale (R. 106). The Commission points out that the shippers advocated strict adherence to the distance principle and observance of the distance scale, modified in its application to provide for very limited groupings

so as to preserve industrial districts or groups, such as the Atlanta district, the Birmingham district, etc. (R. 54).

With respect to the level of the Alabama rates, proposed by the shippers, the Commission stated (R. 55):

> "One of the shippers' principal witnesses admitted that the rates which they propose are, with the exception of rates within Mississippi and for short distances in Georgia, *lower than any existing fertilizer rates in southern territory that have been prescribed either by us or by State commissions.*"

Also (R. 72):

> "The results of the traffic test tend to bear out the shippers' contentions in regard to the levels of existing fertilizer rates in the various parts of southern territory, *although it also indicates that the shippers' proposed scale falls about 8 per cent below the present average.*"

INTERSTATE BASIS ADOPTED UPON REVENUE CONSIDERATIONS.

Under the caption "The Rate Level for the Future", the Commission summarizes and reviews *seriatim* "the salient points made by the carriers and shippers in support of their proposed scales" (R. 68). It concluded not to adopt either of these scales. Instead, it adopted a scale which it deemed to be appropriate, upon all of the facts of the case, as affording rates which would at the same time be reasonable for uniform application, and which if so applied uniformly, on intrastate as well as interstate traffic throughout the South, would in its judgment

approximately preserve the aggregate revenues of the Southern carriers as a whole on this traffic. The Commission said:

> "In his proposed report the examiner recommended a scale somewhat higher than the shippers' scale and somewhat lower than the carriers'. Upon argument the carriers conceded that the scale so recommended would about maintain their aggregate revenues" (R. 73).

Then, after referring to the unanimity of view that there should be "one uniform scale", which resulted in a "paucity of evidence to the contrary" (R. 76); to the questions of carload minimum and proper gradation of the scale; rule for computing distances; and whether the scale should apply alike on both single and joint-line hauls (R. 76, 77), the Commission, in announcing the scale which it had concluded, upon all of the evidence, to adopt, said:

> "After careful consideration of this evidence, which we have summarized above, and having in mind the principles which we believe should be applied *in distributing the burden of rail transportation* and which are also set forth above, we have reached the conclusion that a scale somewhat different from that recommended by the examiner, *but producing much the same aggregate revenue*, should be adopted" (R. 79).

ADDITIONAL FINDINGS CONCERNING ALABAMA RATES.

Having thus had before it only the question of what uniform mileage scale of rates should be adopted in order to effectuate the purposes of the investigation;

having determined the appropriate level of such scale for interstate application only upon the assumption that the same scale would be applied upon intrastate traffic also throughout the territory; having concluded that if the scale should be so applied uniformly, *and only upon that condition*, the aggregate revenues of the Southern carriers as a whole would be approximately preserved under these mileage rates and the traffic in question would contribute its reasonable proportion to such aggregate revenues; and further, having considered and rejected the proposal to use the Alabama scale of intrastate rates as a standard or measure for such uniform basis—which scale, instead of preserving the carriers' revenues, would have meant on the contrary a reduction of about $1,272,000 per annum therein—the Commission then separately discusses in its report the intrastate cases, including the Alabama case, which had been consolidated with the general investigation. And concerning the Alabama case, it was said:

> "Taking up, first, the Alabama situation, it is shown by numerous exhibits that the rates from points in Mississippi, Tennessee, and Georgia to destinations within Alabama are substantially higher than the Alabama rates for corresponding distances" (R. 88).

This "substantially higher" level of the interstate rates is then illustrated by a table in the report (R. 89). The Commission was careful, however, to explain that this table is intended only to be illustrative of the general situation. The Commission said that "a few illustrations will suffice to give a general idea of the present adjustment" (R. 88). It further said (R. 90):

"In the foregoing table, destinations have been selected approximately equidistant from the respective origins, but for other distances the intrastate and interstate rates bear a similar relation. Manufacturing plants are located at all the originating points shown, and the evidence indicates that the transportation conditions in Alabama are not dissimilar to those met with on the interstate hauls."

This table displays separately the rates under (1) the current Alabama intrastate scale (2) the scale which the carriers had proposed in the general investigation and (3) the scale which the Commission adopted therein, applicable from representative fertilizer shipping points located in Mississippi, Tennessee, and Georgia, as compared with similar shipping points located in Alabama, to representative destinations in that state; and, referring to this table, the Commission found (R. 90):

"As shown by the above table, the new rates (the prescribed interstate rates) will be *substantially higher for equal distances than the Alabama intrastate rates*, and they will be subject to the same carload minimum."

The Commission then made the following finding with reference directly to the intrastate rates in Alabama as a whole (R. 90):

"While exact harmony between intrastate and interstate rates may not in all cases be required by the law, nevertheless *when there is such a preponderance of intrastate traffic as here obtains*, the conclusion is inevitable that the application of rates thereon *substantially lower* than the inter-

state rates contemporaneously applied under similar conditions must bring about, in some degree at least, the unjust discrimination against interstate commerce as well as the undue prejudice to persons or localities in interstate commerce which are declared by the act to be unlawful."

After setting forth in its report the basic or underlying grounds thereof, the Commission, in announcing its ultimate conclusion and in entering its order concerning the Alabama intrastate rates, found as follows:

> "We find that the maintenance of intrastate rates in Alabama on a lower basis than the corresponding rates herein found reasonable for the interstate transportation of fertilizers and fertilizer materials will for the future result in unjust discrimination against interstate commerce and in undue prejudice to persons and localities in interstate commerce" (R. 96).

The Findings of the Commission, as Thus Set Forth In Its Report, Clearly Establish an Undue Discrimination Against Interstate Commerce as Such, From the Standpoint of Carrier Income.

In the light of what has thus been shown concerning the investigation which the Commission conducted and the findings therein made by the Commission, we submit that every requirement has been met in this case which is essential to the support of the order upon the ground of undue discrimination against interstate commerce as such. The Commission, as we have pointed out, was confronted with the situation, mentioned in the opening sentences of its report, that general dissatisfaction with the rates on

fertilizer and fertilizer materials throughout the South, on the part of shippers, users and carriers alike, had become "increasingly evident"; that the interstate rates varied greatly for different hauls of similar length; that the intrastate rates in various states were being complained of by the carriers as being unreasonably low; that three separate petitions had been filed by the carriers, seeking investigation of the intrastate rates in Alabama, Georgia and South Carolina, respectively, and relief against such rates under Section 13 of the Act.

A general investigation was accordingly ordered by the Commission on its own motion; it was purposely made territorial in its scope, embracing southern territory as a whole; all railroads operating in Alabama and elsewhere in the South were made respondents; and the Alabama case, together with the two other state cases, was consolidated therewith. In conformity with the provisions of Section 13, the cooperation of state commissions was invited, and numbers of the state commissions, including the Alabama Commission, participated actively throughout the proceeding. The Commission announced to all parties in advance the purposes of the investigation and the kind of evidence which was desired. It set forth the twofold objects sought to be accomplished, namely, to determine a level of rates, graded upon a mileage basis, which would at the same time serve as a uniform standard for the elimination of the numerous discriminations between shippers and localities under the then-existing rate structure, and would likewise accord to this particular commodity its appropriate position in the general scheme of rates on classes and commodities throughout the southern territorial re-

gion or group, having in mind the relation of the aggregate revenues of the southern carriers on this traffic to their aggregate revenues as a whole on all traffic; and while recognizing that not all of the intrastate rates in the South were directly in issue, but only the rates in the three states of Alabama, Georgia and South Carolina, it was announced that to the end of reaching "a basis for achieving harmony" between the interstate and intrastate rates testimony concerning the intrastate rates throughout the South would be freely received.

After holding most extensive hearings and after receiving and considering the evidence and views of all shippers and carriers alike, as well as of the state commissions including the Alabama Commission; and having found that there was a unanimity of opinion that a uniform basis of mileage rates would represent the only solution of the problem, the Commission thereupon adopted and promulgated for this purpose that scale of mileage rates which, in the exercise of its best judgment, would most appropriately serve to meet the requirements of Sections 3 and 4 of the Act, from the standpoint of shippers and localities, and the requirements likewise of Sections 13 and 15a from the standpoint of carrier income. And it thereupon ordered this scale into effect uniformly, so far as it was empowered to do so, with the full expectation that this scale would be adopted and applied—as it was designed and intended to be applied—uniformly on the intrastate traffic as well as the interstate traffic throughout the South. It considered and rejected, on the other hand, the proposal, advocated by the shippers and the Alabama Commission, to adopt as such uniform basis the Alabama intrastate rates.

Where, as the Commission found, so large a preponderance of the total tonnage of the traffic (about 70 per cent) is intrastate; where such an important percentage of the carriers' revenues (about 60 per cent) is dependent upon the intrastate tonnage, as contrasted with the interstate tonnage and movement; and where the interstate rates, as in this case, have themselves been adopted and ordered into effect by the Commission on the basis of preserving the aggregate revenues of the carriers *provided* the same rates shall be applied alike on the intrastate traffic in the several states, it is apparent how necessary it becomes for the intrastate traffic to bear its fair share of the transportation burden and to contribute ratably and equitably to the carriers' revenues if an unjust discrimination against interstate commerce is to be avoided. Obviously, if the states are to be free under these conditions to determine the respective levels of intrastate rates in the several states, and to maintain—as the State of Alabama is here seeking to do—a statewide level of intrastate rates that have been shown, and found by the Commission, to be so materially lower than the interstate rates prescribed and fixed by the Commission, it will follow that the loss resulting from the lower rates on intrastate traffic must be made up by increasing the interstate rates on fertilizer and fertilizer materials, or else by placing the additional burden upon other interstate traffic.

As the Court said in the *Wisconsin Case, supra*, (66 L. ed. at p. 382):

"Intrastate rates and the income from them must play a most important part in maintaining

an adequate national railway system. Twenty per cent of the gross freight receipts of the railroads of the country are from intrastate traffic, and fifty per cent of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. *The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system.*"

And again (66 L. ed. at p. 384), after pointing out that the same transportation systems are used for both state and interstate transportation, it is said:

"The states are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it *unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business.* Congress, as the dominant controller of interstate commerce, may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work."

And to the same effect is the recently decided *Florida Case*, 75 L. ed. ——, U. S. Adv. Ops. at p. 219, wherein it is said:

"As intrastate rates and the income from them must play a most important part in maintaining

such a system, the effective operation of the act requires that intrastate traffic should pay 'a fair proportionate share' of the cost of maintenance. And if there is interference with the accomplishment of the purpose of the Congress because of a disparity of intrastate rates, as compared with interstate rates, the Commission is authorized to end the disparity by directly removing it. Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 66 L. ed. 371, 22 A. L. R. 1086, 42 S. Ct. 232, *supra;* New York v. United States, 257 U. S. 591, 66 L. ed. 385, 42 S. Ct. 239, *supra.*"

We have shown that there was no failure of the Commission to make the underlying or basic findings leading to its ultimate conclusion that the intrastate rates in Alabama, fixed by the order of the Alabama Commission, will cause a continuing undue discrimination against interstate commerce and burden upon such commerce from the standpoint of carrier income. The report sets forth fully and completely the reasons justifying the exercise by the Commission of its recognized power in that connection (*Florida vs. United States, supra*). The Commission's conclusions with respect to the aggregate revenue effect of the different scales of rates under consideration, which included alike the carriers' proposed scale; the scale which the Commission itself adopted; and likewise the Alabama scale of intrastate rates—proposed and advocated by the shippers as well as by the Alabama Commission—were all based upon undisputed evidence, being in fact estimated upon the basis of an actual rerating of the entire tonnage of fertilizer and fertilizer materials, both state and interstate, throughout the South. And the Commission accepted

the estimate of the carriers, by whom this rerating was done at its request, concerning the anticipated annual revenue loss (approximately $1,272,000) if the Alabama basis of rates should be adopted as the general basis, which estimate is admitted by the Alabama Commission to be not far out of line.

If it be suggested that there was any deficiency in the Commission's findings in that it did not undertake to estimate, and state in dollars and cents, the exact proportion of this total yearly revenue loss which will accrue separately on the Alabama intrastate tonnage, the obvious explanation is that the Commission well knew that no estimate of this kind, under the conditions which surround the fertilizer movement, could fail to be quite wide of the mark. The Commission knew that this loss, while very large each year, would vary materially from year to year. The reason is that in the distribution of this commodity there is a constant shifting of the tonnage from time to time as between competing manufacturers, located at different points in the same general territory and shipping at times in intrastate commerce and at other times across the state lines in interstate commerce. As one shipper witness before the Commission expressed it:

> "The movement of fertilizer varies so—that is, I mean, it varies from different factories. One year, a good big tonnage may move from a certain point and the next year that tonnage may be decreased very much, and move from another point, and of course that would affect the revenue to a great extent." (R. 700).

But the Commission did find that a large volume of fertilizer is consumed annually in Alabama, repre-

sented by an average use of 230 pounds per acre of fertilized crops, and estimated by one Alabama witness as totalling 580,000 tons in one year; that numerous fertilizer factories are located at points in Alabama, and the movement from the factories is usually for short distances; it showed by a table in the report the rates from some of these manufacturing points to destinations in Alabama, carefully stating, however, that the table was intended merely to be illustrative of the general situation; it found that the interstate rates which it adopted and ordered into effect are "substantially higher" than the Alabama intrastate rates. It found that these Alabama rates are in fact lower than any other existing fertilizer rates that had been prescribed by either itself or by state commissions anywhere in Southern territory. It found that in the South generally, including Alabama, the intrastate traffic represents 70 per cent of the tonnage, and the revenue thereon about 60 per cent of the revenue; and it further found, having particular and direct reference to the Alabama situation and rates, that "when there is such a *preponderance of intrastate traffic as here obtains*" the maintenance of the "*substantially lower*" intrastate rates fixed by the Alabama Commission, and in effect throughout that state, will cause the undue discrimination against interstate commerce which the Commission thereupon found and stated to exist and ordered removed. We submit that the Commission's findings are as definite, direct and positive as they could reasonably have been made under any proper interpretation of the Court's decisions upon that subject.

If the case is considered, as it clearly should be throughout, from the standpoint of the Commission's territorial investigation and the evidence and findings therein, it is apparent that the Alabama Commission is here seeking merely to have its own judgment substituted for the judgment of the Interstate Commission concerning the level of that uniform basis of rates which shall apply within the state of Alabama and apply likewise in interstate commerce between Alabama and other states. The Alabama Commission sought to bring about the adoption of the scale of rates which that commission had itself prescribed. This was the immediate purpose of the testimony offered on its behalf in the general investigation and its witness so stated. The Interstate Commission, after a most comprehensive and thorough study of the situation throughout the South, declined to use the Alabama intrastate rates as a standard and concluded instead that a much higher scale should be adopted. And when a conflict of this sort has arisen the judgment of the Interstate Commission must prevail. That body, rather than the Alabama Commission, is charged with all of the various duties imposed by the Interstate Commerce Act, as amended by Transportation Act, 1920, with respect to the preservation of such general rate structure and level throughout the South as may be necessary to the proper maintenance of an adequate transportation system.

Referring to the Transportation Act, the Court said in the *Wisconsin Case* (66 L. ed. at p. 382):

> "The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people

of the United States. This is expressly declared in Section 15a to be one of the purposes of the bill."

And in the same case, at page 384:

"Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonably compensatory return for all the work it does. The states are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which would burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear (citing cases). In such development, it can impose any reasonable condition on a state's use of interstate carriers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of the national power in this field."

Significant also is the following statement, in the *Wisconsin Case*, in response to the argument that the construction there upheld would give the Commission unified control of both interstate and intrastate commerce (66 L. ed. at p. 384):

"It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce

Commission in this regard should be directed to substantial disparity which operates as a real discrimination against and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves *on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce.*"

The Court then adds:

"It may well turn out that the effect of a general order in increasing all rates, like the one at bar, will, in particular localities, reduce income instead of increasing it, by discouraging patronage. Such cases would be within the saving clause of the order herein, and make proper *an application to the Interstate Commerce Commission for appropriate exception.* So too, in practice, when the state commissions shall recognize their obligation to maintain a proportionate and equitable share of the income of the carriers from intrastate rates, conference between the Interstate Commerce Commission and the state commissions may dispense with the necessity for any rigid Federal order as to the intrastate rates * * *."

It may here be noted that in the instant case the Commission gave full recognition to the limitations thus described by the Court in the *Wisconsin Case.* The Commission recognized and stated in its report that "exact harmony between intrastate and interstate rates may not in all cases be required by the law" (R. 90). It accordingly made no order with respect to the Georgia and South Carolina intrastate rates, although those rates also were directly in issue, having concluded that such variations between the

interstate and intrastate rate levels in these states were insufficient to make necessary the entrance of such an order (R. 93, 97).

But when the Commission has made such findings as it made in this case concerning the low level of the Alabama intrastate rates, proposed and advocated by shippers and the Alabama Commission in the investigation, and when it has prescribed and fixed the general interstate level under the circumstances shown upon this record, how can undue discrimination against interstate commerce be avoided if it is once recognized that these same Alabama rates are still to be permitted to continue in that state? If that may be done in Alabama, will not similarly low rates inevitably be sought to be imposed by the commissions of other and neighboring states for the benefit of the intrastate shippers and traffic of such other states? And if these successive reductions are brought about in the intrastate rates, it requires no argument to show that the rates applying on movements in interstate commerce across the state lines will eventually be forced down also, through the influence of competition, with the ultimate result that the entire interstate rate structure must likewise in the end be broken down and destroyed—being controlled indeed by the level of these same intrastate rates in Alabama which the Interstate Commission has already found and declared, as the result of its investigation, to be altogether too low to meet the requirements of the law from the standpoint of the general revenues of the southern carriers.

It was just such successive reductions from time to time in intrastate rates in the several southern states that had in the past served to create the sit-

uation, described in its report, which led the Commission to institute its territorial investigation. There is no attack here upon either the power of the Commission to order such investigation or upon its order therein entered fixing the general rate level. There can be no claim, and none is made by the appellants, that the Commission could have adopted any better or more effective method of discharging the important general duties which the law imperatively directs it to perform. And when the Commission has proceeded as it did in this case, and in the light of its informed judgment has undertaken to discharge the responsibilities and duties resting upon it, all that it has sought to accomplish with respect to the uniform system of rates on this traffic to be applied throughout the southern territory must inevitably be frustrated and destroyed, and the whole purposes of its investigation defeated, if it is once recognized that the states shall be free to depart at will from the standard that has been set as the result of that investigation. If that doctrine must be accepted it becomes difficult indeed to conceive how the Commission could in any case, with respect either to fertilizer or to the numerous other commodities moving throughout southern territory, carry out the important purposes sought to be attained by the Interstate Commerce Act, as amended by the Transportation Act of 1920.

It is submitted, therefore, that there was no error of the court below in refusing to enjoin the order of the Commission, as grounded upon undue discrimination against interstate commerce.

II.

THE ORDER IN ITS STATEWIDE APPLICATION IS AMPLY SUPPORTED BY THE COMMISSION'S FINDINGS, UPON EVIDENCE, WITH RESPECT TO DISCRIMINATION BETWEEN PERSONS AND LOCALITIES.

The Commission, as we have pointed out, grounded its order directing a general increase in the Alabama intrastate rates upon a finding, not only of undue discrimination against interstate commerce from the standpoint of carrier revenues, but upon the further and additional finding that the Alabama intrastate rates, as a whole, cause undue discrimination between persons and localities and unjust preference to intrastate shippers and localities in Alabama. We will next show that there was no error of the court below in sustaining the order upon this latter character of discrimination, as well as upon the former.

It is settled law, many times stated by the Court, that the existence of undue discrimination between particular persons or localities is a question of fact. And upon that question the Commission's findings, if supported by substantial evidence, are conclusive and will not be reviewed by the courts. The rule is concisely stated in the *Virginian Railway Co. case, supra*, as follows:

> "The Virginian attacks the Commission's finding of unjust discrimination. There clearly was substantial evidence to support every fact specifically found. To consider the weight of the evidence before the Commission, the soundness

of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province. Whether a rate is unjustly discriminatory is a question on which the finding of the Commission, supported by substantial evidence, is conclusive, unless there was some irregularity in the proceeding or some error in the application of rules of law. *Western Paper Makers' Chemical Co. v. United States*, 271 U. S. 268."

Virginian Ry. Co. v. United States, 272 U. S. 658, 71 L. ed. 463, 467.

The rule just referred to is somewhat closely related to the provisions of Section 14 (1) of the Act, as amended in 1906, whereby the Commission is directed, in reparation or damage cases, to include in its report the findings of fact on which the award is made, the requirement with respect to similar findings in cases not involving reparation having been dispensed with by the 1906 amendment (*Texas etc. R. Co. v. I. C. C.*, 162 U. S. 197; *Manufacturers R. Co. v. U. S.*, 246 U. S. 457; *Meeker & Co. v. Lehigh Valley R. Co.*, 236 U. S. 412; *Mills v. Lehigh Valley R. Co.*, 238 U. S. 473).

Upon this branch of the case, therefore, our contention is that the Commission has found, upon appropriate evidence, such discrimination between particular Alabama intrastate shippers and localities, on the one hand, and interstate shippers and localities, on the other; and further, that the discrimination thus found is shown by the Commission in its report to be amply comprehensive in its extent to justify the Commission in entering a statewide order under Sections 13 and 3 of the Act, instead of an order separately di-

rected against each separate instance of discrimination between particular persons or localities. The order is statewide in its scope, and the Commission has found that the discriminations also are statewide. It could hardly have found otherwise in the face of the evidence which was before it in its general investigation, when considered also in the light of the scope and purposes of that investigation; the reasons why it was instituted by the Commission; the unanimity of opinion concerning the pressing need for a uniform basis of rates in order to remove existing discrimination throughout the territory; and the uniform mileage scale which the Commission adopted for that purpose—to all of which we have heretofore referred. We will next briefly review some of the evidence which supports these findings of discrimination.

Exhibit No. 46, introduced before the Commission and reproduced as Appendix A* to this brief, shows the location of fertilizer plants in Southern territory. It will be observed upon reference to this exhibit, that there are numerous fertilizer plants located in Georgia, Tennessee, Mississippi and Florida contiguous to the State of Alabama, and numerous other plants that are scattered throughout that state.

There is a heavy movement of fertilizers and fertilizer materials from interstate points of origin to destinations in the State of Alabama. The following statement, reproduced from Statement D of Exhibit No. 492, filed before the Commission, shows the state and interstate movements to Alabama destinations during March and April, 1925:

*This exhibit is not in the printed record, but is reproduced here in accordance with the stipulation of the parties (R. 1028). Portions of exhibits not in the printed record which may be reproduced at later points herein are likewise reproduced in accordance with the stipulation referred to.

Destined to		Number of Cars	Weight Tons
Alabama	Intrastate	8,621	242,465.44
	Interstate	3,976	103,441.18

It will be observed that during this two months' period 12,597 carloads of fertilizers and fertilizer materials moved to destinations in Alabama. Of this number 3,967 carloads moved from *interstate* points of origin. The movement from interstate origins to Alabama during this two months' period aggregated 103,500 tons. Inasmuch as the movement for this two months' period represents approximately one-half of the annual movement (R. 66) it is obvious that the annual movement of fertilizer from interstate points to Alabama destinations aggregates approximately 7,952 carloads.

Witness Prescher, Assistant to the Vice President in charge of traffic of the Louisville & Nashville Railroad, was the principal witness for the carriers with respect to the discrimination in favor of Alabama shippers and localities against interstate shippers and localities and testified at length concerning the Alabama intrastate rates as compared with the rates from manufacturing and shipping points in adjacent states (R. 445-484). He introduced numerous exhibits showing rates, distances and movement of traffic from Alabama points as compared with interstate points and pointed out the discrimination against interstate shippers. In selecting points in other states from which he compared the rates with the Alabama intrastate rates he undertook to use *fertilizer manufacturing points which sell their products in Alabama in competition with Alabama fertilizer manufacturers* (R. 455, 602).

Mr. Drescher compared the rates from Birmingham, Ala., and Nashville, Tenn., to Alabama points on the Louisville & Nashville Railroad between Birmingham and Nashville; the rates from Decatur, Ala., and Chattanooga, Tenn., to intermediate Alabama points on the line of the Southern Railway; the rates from Birmingham, Ala., and Rome, Ga., to intermediate Alabama points on the Southern Railway; the rates from Birmingham, Ala., with the rates from Columbus, Ga., to intermediate Alabama points on the Central of Georgia Railway; the rates from Birmingham with the rates from Atlanta, Ga., to intermediate Alabama points on the Southern Railway; the rates from Montgomery, Ala., with the rates from Richland, Ga., to intermediate points on the Seaboard Air Line Railway; the rates from Montgomery, Ala., with the rates from Columbus, Ga., to intermediate points on the Central of Georgia Railway; the rates from Decatur, Ala., with the rates from Corinth, Miss., to intermediate points on the Southern Railway; the rates from Birmingham, Ala., with the rates from Tupelo, Miss., to intermediate points on the St. Louis-San Francisco Railway; the rates from Mobile, Ala., with the rates from Pensacola, Fla., to stations on the Louisville & Nashville Railroad between Flomaton, Ala., and Montgomery, Ala.; the rates from Eufaula, Ala., with the rates from Columbus, Ga., to stations on the Central of Georgia Railway in Alabama, and the rates from Birmingham, Ala., with the rates from Meridian, Miss., to intermediate Alabama points on the line of the Alabama Great Southern Railroad (R. 455-462).

Obviously we can not reproduce all of the exhibits filed by Mr. Drescher illustrating this discrimination

against interstate localities and shippers. We will, however, reproduce as Appendix B to this brief, his Exhibit No. 291 filed before the Commission, which is illustrative of the discriminatory situation.

Birmingham, Ala., and Nashville, Tenn., are both located on the main line of the Louisville & Nashville Railroad. Fertilizers are consumed at Alabama points between Birmingham and Nashville and both Birmingham and Nashville manufacturers undertake to distribute their products at these intermediate stations. Exhibit No. 291 shows the distances from Birmingham and Nashville to intermediate Alabama stations, the rates at the time of the hearing before the Commission from both Birmingham and Nashville, and also the movement of fertilizer to these stations from Birmingham and Nashville for the months of March and April, 1925. The exhibit also shows that Nashville manufacturers of fertilizers sell their product at stations on this line as far south as Boyles, Ala., which is only 3 miles north of Birmingham.

The discrimination which exists against Nashville in favor of Birmingham and in favor of intrastate traffic against interstate traffic is apparent from the exhibit. For example, Athens, Ala., is 98 miles from Birmingham and 107 miles from Nashville. At the time of the hearing the rate on fertilizer, in carloads, from Birmingham to Athens was $1.95 per ton and from Nashville to Athens it was $2.59 per ton. At Elkmont, Ala., 107 miles from Birmingham and only 98 miles from Nashville the rate from Birmingham was $2.05 per ton while the rate from Nashville was $2.59 per ton.

These are typical examples of the discrimination

against interstate commerce and interstate traffic which the Commission ordered removed. Such discrimination existed not only against Nashville and manufacturers located at Nashville, in favor of Birmingham and manufacturers located at the latter point, but also against various interstate points including Atlanta, Rome, Columbus and Richland, Ga., Pensacola, Fla., Corinth and Meridian, Miss., and manufacturers located at such points.

The movement from interstate origins to Alabama destinations is by no means limited to short hauls from points in adjacent states near the Alabama State line. For example, Exhibit No. 288, submitted before the Commission, shows the total movement and the points of origin of all shipments of fertilizer to destinations in the State of Alabama located on the Alabama, Tennessee & Northern Railroad for the first four months of 1925. This exhibit is, in part, as follows:

Point of Origin	Number of Carloads
Mobile, Ala.	42
Montgomery, Ala.	36
East Point, Ga.	23
Meridian, Miss.	16
East Birmingham, Ala.	7
Bessemer, Ala.	6
Grasselli, Ala.	5
Northport, Ala.	1
Atlanta, Ga.	1
Macon, Ga.	1
New Orleans, La.	1
Total	139

It will be observed that out of the total of 139 carloads of fertilizer moving to destinations on the Alabama, Tennessee & Northern in Alabama during the period stated, 41 carloads originated at points in other states, such as East Point, Atlanta and Macon, Ga., and New Orleans, La. Atlanta, Macon and East Point are in the central portion of the state of Georgia, while the points on the Alabama, Tennessee & Northern are in the western portion of the state of Alabama.

Mr. C. W. Hayward, appearing on behalf of the Meridian, Miss., Traffic Bureau, testified in part as follows (R. 742):

> "We are in accordance with the principle of equalization, which we understand it is the purpose of the Commission to effect by this investigation. We have discriminations against Meridian not only in the intrastate rates in Alabama, but also in the interstate rates from manufacturing points in Mississippi and from points in Georgia.
>
> "* * * We have a large fertilizer factory in Meridian. They operate three factories, one in Meridian, one at Hattiesburg, and one at Shelbyville. And fertilizer is a commodity that is not necessarily limited to a restricted zone of distribution. The Meridian Fertilizer Factory can and does ship into Alabama, Georgia, Florida, and all over the Southeast, wherever they may place their product, and I do not know to what extent, whether they do to a very large extent, but it is not a commodity that is limited in its distribution.
>
> "As to the movement into Mississippi, I know that there has been a movement from Alabama—possibly Montgomery, Ala., into plants surrounding Meridian, into our trade territory, and that

has been possible largely because of these discriminations in favor of the Montgomery shipper, the Alabama shipper. I don't know that our factory ships into Georgia, now. I would not be in position to state definitely that they are covering those states to any extent, but I say it is possible to do it, just as it is possible for Atlanta or Montgomery or Birmingham or any fertilizer manufacturing point to ship into Mississippi, but we think that rates from Meridian into Alabama and Georgia should be on the same plane, same relative plane, as rates from fertilizer plants in Alabama and Georgia to Mississippi".

Mr. J. H. Alldredge, who appeared in the hearings before the Commission as a witness for the Alabama Public Service Commission, testified:

"Now, as to grading the scale. Fertilizer factories are scattered all over the Southeastern territory, and are actively competing in common territory in the sale of fertilizer, and if a scale breaks too abruptly, the chances are that one or more of the several factories competing in the same territory will obtain the advantage of the breaking scale, and use it against its competitors. *The sale of fertilizer seems to have pretty keen competition, and the fertilizer factories are scattered around, so that in almost every spot in the Southeast there is competition between two or more factories.*" (R. 818.)

And again, this witness testified as follows:

"Now, there is another very important element entering into this question of grading of fertilizer scale, and balancing it, particularly as between the short hauls and the long hauls. There are factories situated along the Gulf Coast and

the South Atlantic and North Atlantic Coasts that have a natural advantage in assembling their raw materials over the interior factories. And if a scale is graded in such a way that an artificial preference is given to the long-haul shipper over the short-haul shipper located back in the interior, he can combine that advantage with his natural advantage, and play havoc with the interior man. I do not know of anything that is more important to be considered in the grading of the scale than that fact itself. We endeavored to avoid that. I do not say that the short-haul shipper should have any advantage over the long-haul shipper; I think that both should have justice, but it is quite important to see that the scale is not unbalanced as between the short hauls and the long hauls." (R. 819.)

Certainly this representative of the State of Alabama recognized that the movement of fertilizer and fertilizer materials is not confined entirely to short hauls and the importance of having the rates so made as to bring about a fair and proper relationship as between the short-haul and the long-haul shipper.

There can, therefore, be no room for contention here that the interstate movement of fertilizer into Alabama is for short hauls from border points in other states. This case, in other words, presents no situation which is at all similar to that referred to in the *Wisconsin case, supra*, wherein it was said, concerning the passenger fares there under consideration:

"The order in this case, however, is much wider than the orders made in the proceedings following the Shreveport and Illinois C. R. Co. Cases. There, as here, the report of the Com-

mission showed discrimination against persons and localities at border points, and the orders were extended to include all rates or fares from all points in the state to border points. But this order is not so restricted. It includes fares between all interior points, although neither may be near the border, and the fares between them may not work a discrimination against interstate travelers at all."

Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 66 L. ed. 371, 379.

In the instant case, unlike the *Wisconsin case*, there are involved the rates on a commodity, fertilizer, the use of which is very general throughout the state of Alabama; which is sold and distributed from the different factories, located either within the state or beyond the state lines, on a highly competitive basis; and which is, as the Commission stated, "of distinctly low grade, its value for the most part being well within $1,000 per car" (R. 74), the result being that only a very small margin of difference in freight costs will divert the sale in any given instance from one manufacturer to another. The undisputed testimony of witness after witness in the case is to the effect that fertilizers and fertilizer materials move throughout the State of Alabama in both intrastate and interstate commerce; that the interstate movement into that state is not confined to border points, but, on the contrary, there is a large movement from points outside of Alabama, both into and through that state, and for relatively long hauls (see also Appendix B hereto); and further, that in Alabama, as in other portions of Southern territory generally, fertilizer factories are located at numerous points,

and the various manufacturers are active competitors among themselves for the sale and distribution of their products throughout the surrounding territory.

It was upon such evidence as above outlined, together with a very large amount of similar testimony which need not here be reviewed, that the Commission found that the discriminations between persons and localities *are in fact statewide*, and the Commission accordingly made its order statewide in its scope and application. It found that transportation conditions within Alabama are not dissimilar to those prevailing with respect to interstate transportation between other states and Alabama, stating in the report:

> "* * * the evidence indicates that the transportation conditions in Alabama are not dissimilar to those met with on the interstate hauls" (R. 90).

The Commission further found, as we have heretofore shown, that the interstate rates which it adopted and prescribed in the general investigation are as a whole "substantially higher" than the intrastate rates in Alabama, as a whole. It illustrated the discrimination by the table in its report (R. 88), carefully stating, however, that this table is merely illustrative of the general situation. It said that the points included in this table are some of the points at which fertilizer factories are located; and it showed that while this table carries destinations approximately equidistant from the respective origins "for the other distances the intrastate rates and interstate rates bear a similar relation" (R. 90).

It is not essential to the support of the order that there shall be specific and separate proof of discrimination with respect to every individual rate separately. As the Court said in the *Wisconsin Case* (66 L. ed. at p. 379):

> "Any rule which would require specific proof of discrimination as to each fare or rate and its effect would completely block the remedial purpose of the statute."

We submit that the Commission's findings of statewide discrimination between persons and localities, made upon such evidence as we have described above, are entirely adequate and sufficient for the support of its statewide order upon this ground also, in addition to the ground of undue discrimination against interstate commerce; and accordingly, that the decree of the court below should be affirmed.

Respectfully submitted,

W. N. McGehee,
W. A. Northcutt,
Frank W. Gwathmey,
Attorneys for Alabama Carriers.

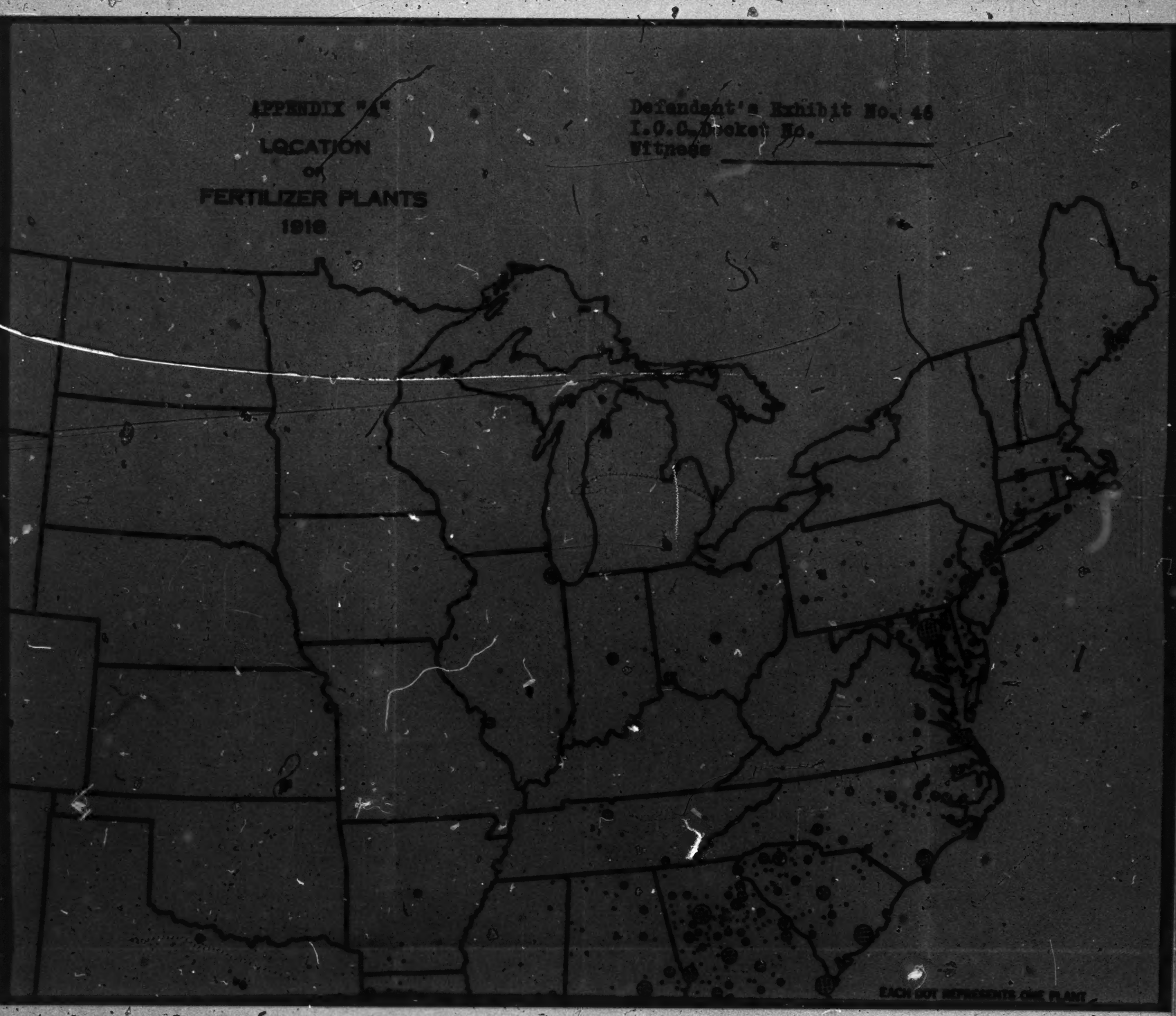
Washington, D. C.,
April 16, 1931.

APPENDIX "A"
LOCATION
OF
FERTILIZER PLANTS
1916

APPENDIX "A"

LOCATION
OF
FERTILIZER PLANTS
1918

Defendant's Exhibit No. 46
I.C.C. Docket No.
Witness



EACH DOT REPRESENTS ONE PLANT
CIRCLES INDICATE THE LOCATION OF MORE
THAN ONE PLANT IN A CITY OR TOWN

General Investigation Rates on
Fertilizer and Fertilizer Materials
between Southern Points.
I.C.C. Docket No. 16295.

STATEMENT OF THE PRESENT RATES AND THE RATES ON BASIS OF THE THIRD ROYSTER SCALE (SC
TENN. TO AGENCY STATIONS ON THE LOUISVILLE & NASHVILLE R.R. BETWEEN BIRMINGHAM AND

From Birmingham, Alabama To	Distance	Present Rate	Third Royster Scale	Movement March and April, 1935 Cars	Movement March and April, 1935 Tons	From Nashville, To
L.&N. R.R. Stations						L.&N. R.R. S
Boyles, Ala.	3*	8[illegible]	90			
Monmouth, "	18	110	135			Franklin,
Trafford, "	24	120	147			Thompsons,
Hayden, "	29	125	156	2	44.7	Spring Hill,
Blount Springs, "	33	130	156	2	64.8	Carter's Cre Dark's Mill
Garden City, "	39	135	169	9	209.5	
Hanceville, "	43	140	180	15	459.2	Columbia,
Cullman, "	53	150	198	84	1626.3	Pleasant Gro Lynnville,
Logan, "	64	160	203			
Falkville, "	67	165	214	4	77.5	Buford,
Hartselle, "	72	170	214	3	90.1	Riverburg,
Decatur, "	85	180	237	16	498.2	Giles, Pulaski,
Tanner, "	93	190	248			Aspen Hill,
Athens, "	98	195	259			Prospect,
Elkmont, "	107	205	259	3	70.7	
				1	40.3	Elkmont,
Prospect, Tenn.	115	259	270			Athens,
Aspen Hill, "	120	259	270			Tanner,
Pulaski, "	134	259	270			
Giles, "	151	259	282			Decatur,
Riverburg, "	134	259	282			Hartselle,
Buford, "	138	259	282			
						Falkville
Lynnville, "	142	259	293			Logan,
Pleasant Grove, "	150	259	293			Cullman,

APPENDIX "B"

Respondent's Exhibit No. 201.

TES ON BASIS OF THE THIRD POYNTER SCALE (80 I.C.C. 34) FROM BIRMINGHAM, ALA. AND NASHVILLE, & NASHVILLE R.R. BETWEEN BIRMINGHAM AND NASHVILLE.

rd Poynter Scale	Movement March and April, 1926. Cars	Tons	From Nashville, Tennessee To	Distance	Present Rate	Third Poynter Scale	Movement March and April, 1926. Cars	Tons
			L.&N. R.R. Stations					
			Franklin, Tenn.	18	147	136		
			Thompsons, "	26	147	156		
	2	44.7	Spring Hill, "	31	147	162		
	2	84.8	Carter's Creek, "	36	149	169		
			Bank's Mill "	38	149	169		
	9	208.8						
	15	459.8	Columbia, "	46	303	180		
	36	1028.3	Pleasant Grove, "	56	306	192		
			Arnsville, "	65	303	203		
	4	77.8	Bufords, "	67	325	214		
			Riverburg, "	71	325	224		
	3	90.1						
			Wales, "	74	325	214		
	16	498.2	Pulaski, "	79	325	228	7	181.2
			Aspen Hill, "	85	359	237		
			Prospect, "	90	359	237		
	3	70.7						
	1	40.5	Elkmont, Ala.	98	359	259	6	256
			Athens, "	107	359	259	93	1900
			Tanner, "	114	359	270	5	59
			Decatur, "	120	359	270	3	138.3
			Hartselle, "	133	359	270	46	1265
			Falkville "	138	359	270	3	111.2
			Lacey, "	142	359	270	3	88.0
			Cullman, "	165	359	275		

Lynnville,	142	259	293	
Pleasant Grove,	150	259	293	Cullman,
Columbia,	160	259	315	Hanceville, Garden City,
Dark's Mill,	167	259	315	
Carter's Creek,	169	259	315	Blount Spri
Spring Hill,	174	259	327	Hayden,
Thompsons,	177	259	327	Trafford,
Franklin,	187	252	327	Monmouth, Boyles,
Nashville,	205	293	349	Birmingham,

Tariff Authorities

L. & N. R.R. I.C.C. A-15193 and A
Agent Glenn's I.C.C. A-498,
Agent Speiden's I.C.C. 796.

[illegible],
Cullman,
Hanceville,
Arden City,
Blount Springs,
Hayden,
Trafford,
Monmouth,
Boyles,
Birmingham,

Tariff Authorities

L. & N. R.R. I.C.C. A-15193 and A-15321.
Agent Glenn's I.C.C. A-496.
Agent Speiden's I.C.C. 796.

152	259	315	40	1159
162	259	315	3	60
166	259	315		
172	259	327		
176	259	327		
181	282	327		
187	282	327		
202	237	349	22	843.0
205	237	349	1	40.9

APPENDIX C.

Interstate Commerce Act, Title 49, U. S. C.: Section 3 (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 13 (3): Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-mak-

ing authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

Section 13 (4): Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Section 15a (2): In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and

equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

Joint Resolution of Congress (Hoch-Smith Resolution), 43 Stat. at L., 801: That it is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move.

That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the Interstate Commerce Act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make, in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist. In making any such change, adjustment, or redistribution the Commission shall give due regard, among other factors, to the general and comparative levels

in market value of the various classes and kinds of commodities as indicated over a reasonable period of years, to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation. In the progress of such investigation the Commission shall, from time to time, and as expeditiously as possible, make such decisions and orders as it may find to be necessary or appropriate upon the record then made in order to place the rates upon designated classes of traffic upon a just and reasonable basis with relation to other rates. Such investigation shall be conducted with due regard to other investigations or proceedings affecting rate adjustments which may be pending before the Commission.

In view of the existing depression in agriculture, the Commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including live stock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service: *Provided*, That no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the commission involving rates on products of agriculture, and that such cases shall be decided in accordance with this resolution.